No. 83-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

BRIEF OF PETITIONER

GORDON LEE GARRETT, JR.
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383
(404) 581-8000

Counsel for Petitioner

HUGH M. DORSEY, JR.
DAVID J. BAILEY
WILLIAM B. B. SMITH
Hansell & Post
Atlanta, Georgia

PETER J. MONTE
Young & Monte
Northfield, Vermont

A. BUFFUM LOVELL
General Counsel
Dun & Bradstreet, Inc.
New York, New York
Of Counsel

QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant absent a showing of "actual malice"?

II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?

III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

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The order and opinion of the Supreme Court of the State of Vermont is not yet officially reported. It is reported unofficially at 461 A. 2d 414 (1983), reprinted in the Joint Appendix at 31-46.

The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Joint Appendix at 25-27.

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976). The order and opinion to be reviewed was dated and entered by the Supreme Court of Vermont on April 15, 1983. On July 8, 1983, and within the time specified under 28 U.S.C. § 2101(c) (1976), Petitioner filed its petition for a writ of certiorari. By order of November 7, 1983, this Court granted the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. amend. XIV, § 1, cl. 2:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B"),[1] Petitioner herein, a publisher of financial reports.[2] The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of $50,000.00 compensatory damages and $300,000.00 punitive damages.

1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice (J.A. 13) to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.[3] None of the five subscribers was a customer of Greenmoss.

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[1] Dun & Bradstreet, Inc. is a wholly owned subsidiary of The Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of The Dun & Bradstreet Corporation are Donnelly & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of The Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Service Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

[2] D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

[3] If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president, John Flanagan, contacted D&B's regional office in Manchester, New Hampshire, and advised D&B that the Special Notice was in error. On that same day, D&B issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. D&B sent the Correction Notice to each of the five subscribers who had received the original Special Notice.

2. The Proceedings Below

The complaint[4] alleged that D&B erroneously reported that Greenmoss had filed a voluntary petition in bankruptcy and that the Special Notice "grossly misrepresented the assets and liabilities of the corporation . . . ." Greenmoss claimed that it had suffered damages, humiliation, injury and loss to its business reputation and standing in the community. Its complaint demanded $7,500.00 in compensatory damages and $15,000.00 in punitive damages. (J.A. 5-7)

At trial, Greenmoss introduced the deposition testimony of Julie Mullen, the employee of D&B who customarily reviewed bankruptcy petitions in Vermont.

Howard Bank, American Express Company, State Mutual Insurance Company, Goodyear Tire and Rubber Company, and Aetna Insurance Company.

[4] The complaint was originally filed on behalf of Greenmoss and its president, Mr. Flanagan. Plaintiffs made identical allegations and sought identical damages. By order dated January 23, 1980, the trial court granted D&B's motion to dismiss Mr. Flanagan as a party plaintiff. (J.A. 1)

(Tr. 287-326)[5] Ms. Mullen's apparent misreading of the Greenmoss employee's petition had caused the erroneous Special Notice to be issued. There is *no evidence* in Ms. Mullen's testimony or in any other part of the record that D&B published the Special Notice with reckless disregard for the truth or with actual knowledge of falsity. Her good faith was never questioned.

Greenmoss did not offer testimony from any of the five subscribers or from any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages and injury was the testimony of its former president, John Flanagan, who had a pecuniary interest in the outcome of the case. Mr. Flanagan conceded that the company's most profitable year was the year that followed D&B's erroneous report. (Tr. 143) Nevertheless, he speculated that although the company's sales and profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of $2,000 - $5,000 in contacting individuals to refute the erroneous information. (Tr. 174) Even so, there was no evidence establishing a causal connection between the publication of the Special Notice to the five subscribers, none of whom were customers of Greenmoss, and the company's alleged injury and damages.

Greenmoss contended that the Special Notice had prompted one of the subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that

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[5] "Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

when he received the Special Notice he did not believe it. He confirmed that day with Mr. Flanagan that Greenmoss was "still alive and kicking and [wasn't] bankrupt." (Tr. 212-13) He testified that he was the only bank officer who saw the Special Notice, that he favored making the pending loan to Greenmoss, but that two senior officers from the bank's home office declined to make the loan for reasons wholly unrelated to the Special Notice.[3] (Tr. 212-13, 215-16, 253-54)

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[3] The bank's representative testified as follows concerning the two senior officers' refusal to make the loan to Greenmoss:

> The concerns expressed by senior officers who judged this request, they were concerned regarding the high debt to worth ratio, which is a ratio of the total debt of the Corporation divided into their net worth. Their working capital was not sufficient for the level of sales that they had. There was some shareholder loans that either had to be subordinated or converted into equity, and this probably was not possible under Subchapter S. The existing mortgage that we had we felt was the maximum for the value we believe the property had. We would not advance any additional funds on that building.
>
> • • •
>
> Q. Is it fair then to say, Wayne, that the reason that the loan was declined is that the Howard Bank ultimately decided that it was in jeopardy of [not] being repaid should the line of credit be extended?
>
> A. That was the decision, yes.

(Tr. 253-54)

There is no record support for the statement of the Vermont Supreme Court that "the bank put off any future consideration of credit to plaintiff until the discrepancy was cleared up." (J.A. 34-35)

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

> Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the *Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed.*

(J.A. 17) (emphasis added). Later the Court added:

> Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; *where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven*, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as

> you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

(J.A. 19) (emphasis added). Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." Instead, it defined "malice" as follows:

> If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously . . . .

(J.A. 18-19) (emphasis added). That instruction allowed the jury to award punitive damages without convincing proof of knowledge of falsity or reckless disregard for the truth.

D&B timely objected to the court's instructions on libel *per se* and punitive damages.

After hearing the trial court's charge, the jury returned a verdict for Greenmoss in the amount of $350,000.00, consisting of $50,000.00 compensatory damages and $300,000.00 punitive damages. (J.A. 2) The $50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only $31,000 in lost profits ($50,000 "projected" profits less $19,000 profits actually

earned), plus expenses not in excess of $5,000. (Tr. 97-99) Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

After the verdict, D&B filed a timely motion for a new trial. (J.A. 2) D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz*:

> The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case. The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:
>
> > "The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."
>
> Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that

> damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.
>
> Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

(J.A. 25-27) (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning its order granting a new trial. (J.A. 29-30) The issue underlying the certified questions was the applicability of *Gertz* to "non-media" defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards announced in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations on presumed and punitive damages derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

> [W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

. . . .

> "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation . . . ."

461 A.2d at 418, 419 (J.A. 40, 42) (citations omitted). As a result, the Vermont Supreme Court held that the trial court erred in granting a new trial and that the trial court should have entered judgment on the verdict.

SUMMARY OF ARGUMENT

The Vermont Supreme Court improperly held that limitations on presumed and punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply only to the "media." In its opinion, the court ignored this Court's holding in *Gertz* that, absent actual malice, the state interest in compensating private defamation plaintiffs extends no further than compensation for actual injury.

The Constitution protects all defamation defendants against presumed and punitive damages in the absence of actual malice. Neither the language nor the history of the First Amendment suggests that any group should have more freedom of speech or of the press than others. This Court has been historically reluctant to give any class of speakers special First Amendment rights. Giving the "media" a preferred constitutional status would tend to undermine, rather than to support, the values embodied in the First Amendment.

Furthermore, the Vermont Supreme Court's "media"/"non-media" distinction is unsound and unworkable. In practice, the judiciary's efforts to divide defendants into "media" and "non-media" classes would

lead to *ad hoc*, inconsistent results in all but the most obvious cases. In their search for an analytical framework for the problem, the lower courts would likely focus on the nature of the speech concerned. That, in turn, would resurrect the "public interest" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Adopting a "media"/"non-media" dichotomy would contradict *Gertz*, which was prompted by dissatisfaction with the *Rosenbloom* approach.

No legitimate state interest justifies a rule that limits the liability of newspapers, magazines, and broadcasters, while subjecting other speakers to greater exposure. Because the lower court authorized presumed and punitive damages where no actual malice existed, and because the rules announced in *Gertz* should apply to all defamation defendants, the judgment of the Vermont Supreme Court should be reversed, and a new trial should be ordered.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT THE AWARD OF PRESUMED AND PUNITIVE DAMAGES ABSENT A SHOWING OF ACTUAL MALICE.

I.

The Vermont Supreme Court Wrongly Refused To Apply First Amendment Limitations On Defamation Damages Recognized In *Gertz v. Robert Welch, Inc.*

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court sought to define "the proper accomodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Id.* at 325. *Gertz* involved a libel action against the publisher of a magazine article which had described the plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Holding that the plaintiff was a "private individual" and not a "public official" or "public figure," this Court held that the trial court had erred in applying the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court held that the states were free to define their own standards of liability in cases involving defamation of private individuals "so long as they do not impose liability without fault . . . ." 418 U.S. at 347.

In *Sullivan*, the Court had focused on the public or private status of the plaintiff to determine applicability of the actual malice liability standard. In *Gertz*, the Court returned to that analytical framework, rejecting the *ad hoc*, content-based approach of the plurality in

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). 418 U.S. at 343-44. The Court doubted the wisdom of committing to the judiciary issues of "which publications address issues of 'general or public interest' " or of " 'what information is relevant to self-government.' " *Id.* at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). The Court was also concerned that adherence to *Rosenbloom*

> would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

418 U.S. at 343-44; *see id.* at 354 (Blackmun, J., concurring) (definitive ruling in defamation area deemed "paramount" and "of profound importance").

Although in *Gertz* it refused to require private plaintiffs to meet the *Sullivan* actual malice standard for liability, the Court declined to reinstate a jury award based on presumed damages. Acknowledging the "strong and legitimate state interest in compensating private individuals for injury to reputation," the Court nevertheless found that the interest "extends no further than compensation for actual injury." *Id.* at 348-49. The Court reasoned:

> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is

> necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.*

Id. at 349 (emphasis added). Accordingly, state remedies for defamation were held subject to First Amendment limitations on presumed and punitive damages. *Id.* at 350.

The Court recognized that recovery of presumed damages under the common law of defamation is an "oddity of tort law":

> Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.* Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. *More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

Id. at 349 (emphasis added).

The Court was equally concerned with the effect of punitive damages in defamation actions. Like presumed damages, punitive damages—in reality civil fines—were irrelevant to the state interest in compensation for actual injury and threatened the same uncontrolled jury discretion.[7] *Id.* The Court therefore held:

> In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350. Because the jury in *Gertz* "was allowed to impose liability without fault and was permitted to presume damages without proof of injury," the Court ordered a new trial. *Id.* at 352.

In this case, the trial court ordered a new trial for the same reason. It found that its charge authorized presumed and punitive damages absent knowledge of falsity or reckless disregard for the truth, and failed to comport with *Gertz*. The Vermont Supreme Court dis-

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[7] As Justice Harlan wrote in *Rosenbloom*:

> At a minimum, even in the purely private libel area, . . . the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, *e.g.*, 3 L. Frumer, et al., Personal Injury § 2.02 (1965); H. Oleck, Damages to Persons and Property § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

403 U.S. at 73 (Harlan, J., dissenting).

agreed with the trial court's decision to grant a new trial. Drawing a distinction between "media" and "non-media" defamation, the Vermont Supreme Court determined that *Gertz* applied only to "media" defendants.

The Vermont Supreme Court ignored *Gertz*'s unequivocal pronouncement that, absent actual malice, "the States have *no substantial interest* in securing for [private] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The decision on review assumes that the States have a legitimate interest in overcompensating victims of "non-media" defamation, even where the defendant acted without actual malice. This Court's clear holding to the contrary in *Gertz* makes that assumption untenable. For that reason alone, the lower court's decision should be reversed, and D&B should be granted a new trial.

II.

The Vermont Supreme Court's "Media"/"Non-Media" Distinction Is Unsound And Unworkable.

A. The First Amendment Protects Freedom Of Expression And Does Not Accord Special Treatment To Any Group Of Speakers.

Neither the language nor the history of the First Amendment supports the view that "media" expression should be exalted above other speech. *See generally* Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77 (1975). Nor is there anything in the First Amendment to suggest that what the communications industry has to say is more worthy of constitutional protection than the words of merchants,

scientists, or machinists. The lower court's decision, however, would accord special treatment to an undefined class of "media" speakers. Other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed.

In a variety of contexts, this Court has refused to acknowledge favored classes of speakers with greater constitutional protection than the ordinary citizen. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978) (*quoting Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). *See Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)); *accord Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[T]he basic principles of freedom of speech and the press . . . do not vary.").

> The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin, supra*, 303 U.S. at 451-452, 58 S.Ct. at 668-669. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fer-

vor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-705, 92 S.Ct. 2646, 2668, 33 L.Ed.2d 626 (1972), quoting *Lovell v. Griffin, supra*, 303 U.S., at 450, 452, 58 S.Ct., at 668, 669.

Bellotti, 435 U.S. at 801-02 (Burger, C.J. concurring).

The holdings in *Sullivan* and *Gertz* were not expressly limited to the "media."[8] *Sullivan* applied the

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[8] In *Sullivan*, the Court's opinion began by declaring that, "We are required in this case to determine for the first time the extent to which the constitutional protections for *speech and press* limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." 376 U.S. at 256 (emphasis added). In *Gertz*, the Court spoke of its struggle "to define the proper accomodation between the law of defama-

same actual malice test not only to *The New York Times*, but also to the persons whose names had appeared in the advertisement at issue. *Sullivan*, 376 U.S. at 286. *Accord St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual defendant not a member of the press); *Henry v. Collins*, 380 U.S. 356 (1965) (*Sullivan* test for liability applied to a private individual's statements).

More important, the justifications for limiting presumed and punitive damages—the absence of state interest and the fear that uncontrolled jury discretion would inhibit the exercise of First Amendment freedoms—do not depend upon the identity of the speaker. The need to avoid punishing the free flow of information exists regardless of the medium through which the information flows. The First Amendment safeguards individual freedom of expression, not the promotion of specialized groups of communicators. As Chief Justice Burger wrote in his concurring opinion in *Bellotti*:

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the

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tion and *the freedoms of speech and press* protected by the First Amendment." 418 U.S. at 325 (emphasis added). Later in the *Gertz* opinion, the Court restated its concern "to assure *to the freedoms of speech and press* that 'breathing space' essential to their fruitful exercise." 418 U.S. at 342 (emphasis added) (citations omitted.)

> press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ' . . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic."

435 U.S. at 801-02 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)). *See also* Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 Ohio St. L. J. 149, 167 (1983) ("The Supreme Court has consistently viewed the different first amendment freedoms as merely different aspects of the same guaranty—the right of free expression."); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885 (1982) ("Creating a mediaocracy contradicts the principle of equal liberty of expression: in a free society, everyone should have an opportunity to present her ideas in the marketplace."); Lewis, *A Preferred Position For Journalism?*, 7 Hofstra L. Rev. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.")*

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* Anthony Lewis has also noted:

> Blackstone, recording the successful outcome of the long English struggle against press censorship, wrote: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. . . ." Every freeman, that is, not just those organized or institutionalized as "the press." Freedom of the press arose historically as an individual liberty. Eighteenth-century Americans saw it in those terms, and the same view is reflected in Supreme Court decisions; freedom of speech and of the press, Chief Justice Hughes said, are "fundamental personal rights." To depart from that principle—to adopt a corporate

B. Affirming The Lower Court's Decision Would Lead To *Ad Hoc*, Inconsistent Rulings Dependent Upon Undesirable Assessments Of Particular Speakers' Messages.

The Vermont Supreme Court's "media"/"non-media" dichotomy creates practical problems no less important than the concerns expressed above. If the application of First Amendment limitations on presumed and punitive damages would now require a threshhold ruling as to the *defendant's* status, the judiciary will be forced to determine who is and who is not a member of the "media." That determination will add further complexity to an already overly complex tort.[10]

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view of the freedom of the press, applying the press clause of the first amendment on special terms to the "institution" of the news media—would be a drastic and unwelcome change in American constitutional premises. It would read the Constitution as protecting a particular class rather than a common set of values, and we have come to understand, after much struggle, that the Constitution "neither knows nor tolerates classes among citizens."

Lewis, *supra* p. 20, at 625-26 (footnotes omitted).

Professor Lange has other, no less compelling, fears:

[I]ndividual interests in speech may be even more seriously threatened by separate constitutional status. With no distinct institutional identification—and now without claim to immediate theoretical alliance with the press—they may find it more difficult to stand up against the constraints which a mass society inevitably finds it convenient to impose.

Lange, *supra* p. 16, at 113 (footnote omitted).

[10] The "media"/"non-media" issue would doubtless require factual development, prompting further discovery, forcing additional briefs, and, in general, making cases of this sort even more expensive—in time, money, and resources—than they already are.

In all but the most obvious situations, the "media"/"non-media" distinction would be impossible to apply. Courts grappling with the issue would be forced to answer a variety of questions. For example, would the size of the speaker's audience be determinative? If the speaker's audience were small, could the stature of the audience entitle the speaker to greater constitutional protection than that available to speakers addressing less influential groups? What should a court do with an individual who earns a livelihood by making speeches to select groups of leading academics or business executives? Would a columnist in a trade or professional journal be more entitled to the appellation "media" than such a speaker? How should the courts treat the person who blurts out a defamatory quip on a television talk show? Would occasional contributors to newspapers be regarded as "media" when repeating their own published statements in a private letter to a friend? Faced with such questions, courts would inevitably reach conflicting decisions.[11] The probable result

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[11] As the Court observed in *Branzburg v. Hayes*, 408 U.S. 665 (1972):

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Id. at 703-04.

would be the very uncertainty and unpredictability the Court had hoped to dispel when it decided *Gertz*.[13]

In their search for the decisive factor, the lower courts would likely find themselves deciding the "media" issue by asking whether particular speakers' messages could be expected to have general interest or mass appeal. The dangers of that approach are obvious. Focusing on general interest or appeal permits unjust discrimination according to the decision-maker's values. Unpopular speech could be given less protection, not because it is less important, but only because it is less popular.

The Court has acknowledged the First Amendment's hostility to content-based regulation. *See Police Department v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *United States Postal Service v. Counsel of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (valid restrictions on time, place and manner of speech must be "content-neutral"); *see generally* Note, *supra* p. 20, at 1880-82 (anti-content-regulation principle is "implicit in the Court's first amendment cases"), and cases cited. Judicial attempts to regulate content interfere with a process that the First Amendment reserves to the marketplace of ideas. *See Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting) ("[I]f the rough and tumble of debate is the best vehicle for producing approximations of fac-

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[13] "[I]t is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority that eliminates the unsureness engendered by *Rosenbloom*'s diversity." 418 U.S. at 354 (Blackmun, J., concurring).

tual truth or preferred opinion, the courts have no business making premature and interim evaluations of contested statements' merits.").

It was the Court's dissatisfaction with content regulation that led it to abandon the short-lived *Rosenbloom* "public interest" test. *Gertz*, 418 U.S. at 346 (discussed at pp. 12-13, *supra*). *See also Sullivan*, 376 U.S. at 271 ("The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' ") (*quoting NAACP v. Button*, 371 U.S. 415, 445 (1963)) *Time, Inc. v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); Shiffrin, *Defamatory Non-media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 926 (1978) ("*Gertz* plainly states that communications which are deemed to have nothing to do with self-government and which do not relate to public issues fall within the ambit of first amendment protection. . . .").

The Vermont Supreme Court's "media"/"non-media" distinction is nothing more than content regulation couched in terms of interest balancing. *See* Note, *supra* p. 20, at 1885-86 ("[P]rotecting speakers based on their media status is a device for protecting political messages; it is content regulation by another name."). Citing language reminiscent of the *Rosenbloom* plurality, the Vermont Supreme Court regarded D&B's Special Notice unworthy of protection because it involved

> "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability

> causing a reaction of self-censorship by the press."

(J.A. 39) (citation omitted). That language signals a return to the concepts the Court found inadequate in *Gertz*.[13]

The lower court regarded "political speech" as the First Amendment's sole concern. But the Constitution protects far more than that:

> It is no doubt true that a central purpose of the First Amendment " 'was to protect the free discussion of governmental affairs.' " *Post*, at 1811, quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659, and *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484. But our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Abood v. Detroit Board of Education, 431 U.S. 209, 231 (1977); *see also Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed

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[13] Prior to *Gertz*, some courts had applied *Rosenbloom's* now discarded "public interest test" to deny First Amendment protection to financial reports. *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) ("business or credit standing" held not a "matter of real public interest"), *cert. denied*, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz*.

as appropriate to enable the members of society to cope with the exigencies of their period.")

As one commentator has aptly stated:

> [A]llocating protection on the basis of political content is repugnant to the very purpose of the first amendment, for such allocation will follow majoritarian impulses. The "political" label can be not only stretched to protect popular messages, but also shrunk to chill unpopular messages. Majorities, however, do not need a constitutional amendment to protect their speech; they can secure statutory protection by pressuring their popularly elected legislators. It is minorities who need a structural provision to shield their messages, regardless of who is in power. No majority is wise or benevolent enough to determine which speech is important and which is not. By enhancing the free flow of all messages, the first amendment ensures that everyone—majorities and minorities—can help to generate the ideas "members of society [need] to cope with the exigencies of their period."
>
> . . . .
>
> Individuals need information about the reputations of other members of the groups they interact with at least as much as—if not more than—they need information about the character of candidates for public office. Ordinary speakers require breathing space for nonpublic speech just as the media require it for public speech. . . ."

Note, *supra* p. 20, at 1881, 1894 (footnotes omitted).

Even if the First Amendment permitted the type of judicial favoritism to "public" or "political" speech the

Vermont Supreme Court would give it, distinguishing between "media" and "non-media" defendants does not serve that purpose. There is no reason to believe that a message broadcast by a "media" voice promotes public or political goals any better than the message of a "non-media" speaker. To the contrary:

> Public issues can be debated with as much force among individuals as in the press. . . . [T]he mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process. . . . The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. . . . Nonmedia speech is always the antecedent of media speech. . . . [I]t is not sensible to treat two speakers differently merely on the ground that one proposes to speak privately while one intends to use the media.

Lange, *supra* p. 16, at 116-17 (footnote omitted). *Accord Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) ("Issues of public interest may equally be discussed in media and non-media content, and the need for a constitutional privilege, therefore, obtains in either case."); Restatement (Second) of Torts § 580A comment h (1976). "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

C. First Amendment Limitations On Presumed And Punitive Damages Should Apply Uniformly To All Speakers.

The Court's analysis in *Gertz* permits no distinction between the "media" and everyone else:

> [T]he reasons given by the Court for its hostility to strict liability for innocent defamation by the press would seem equally appropriate to innocent defamation by non-media defendants, especially where an individual's defamatory statement is likely to cause *less* harm because of its more limited dissemination. In addition, imposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1418 (1975) (emphasis added) (footnote omitted). *Accord* Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306, 334 (1978); Wade, *The Communicative Torts and The First Amendment*, 48 Miss. L. J. 671, 699-700 (1977).

> The rationale behind the constitutional defamation privileges is based on the premise that the fear of a potential defamation lawsuit will inhibit first amendment activity. The rationale is applicable to all forms of speech.

Comment, *supra* p. 20, at 184. *Accord* Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 Tulsa L. J. 601, 625 (1977) ("A constitutional privilege is applied across the board and not nibbled away.")

A "media"/"non-media" distinction would promote injustice. "Media" and "non-media" defendants tried together would be governed by different standards. A newspaper publishing an individual's statement verbatim could "create" a constitutional privilege that would not otherwise apply.[14] Another individual who then repeated the newspaper's statement without knowledge of any falsity could then be held liable for both presumed and punitive damages.[15] Or, as in this case, the same information published by D&B would be judged differently if published in a local newspaper.

The Court should, therefore, take this opportunity to make explicit what *Gertz* already implicitly commands:

> The "ultimate expansion of *Gertz* to provide equal standards of recovery against both media and non-media defendants seems predictable" if, in fact, one can call it an "expansion" at all. The well-established theory of our Constitution appears to be that "every citizen may speak his mind and every newspaper express its view." The

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[14] *See* Comment, *supra* p. 20, at 171 ("It is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected, while the same words spoken to a friend or neighbor would not.") (footnote omitted).

[15] Under common law notions of libel, an individual finding himself in that predicament very likely would be unable to recover contribution from either the "media" defendant or the original publisher, since contribution lies only among joint tortfeasors, while the common law regards each defamatory publication as a separate tort. *See Howe v. Bradstreet Co.*, 135 Ga. 564, 565, 69 S.E. 1082, 1083 (1911) ("If the original publisher does not participate in a republication of the libel by another, he is not liable in a joint action with the second publisher.")

> case law clearly supports the view that the constitutional privilege is as available to the non-media defendant as to the media defendant.

Yasser, *supra* p. 29, at 624 (footnote omitted).

The result Petitioner seeks is the natural consequence of existing doctrine:

> [T]he goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them. This is scarcely to suggest a new theory; there are as many examples of how this might be done as there have been cases referring to "freedom of expression" or turning on "freedom of speech and press." If anything "new" is needed, it is probably a clearer understanding of the risks which may be incurred when the reference point is something less than these concepts.

Lange, *supra* p. 16, at 118.

Commentators have implored the Court to remove all doubts that *Gertz* applies to everyone:

> [T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.
>
> . . . .
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> The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it.
>
> . . . .
>
> [One] . . . reason to believe the Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's

> gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.
>
> . . . .
>
> *The only way to accomodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.*

Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 58, 63, 64, 66 (1976) (emphasis added) (footnote omitted). *Accord* Collins & Drushal, *supra* p. 28, at 333-34; Yasser, *supra* p. 29, at 623-26; Comment, *supra* p. 20, at 169; 52 Wash. L. Rev. 915, 935 (1978).

The Court has already considered the tension between the First Amendment and the law of defamation. In *Gertz*, it struck a balance which fairly serves the competing interests of free speech and personal reputation. The Court achieved that accomodation by focusing on the status of the plaintiff, not the speaker or the message. The Court should not depart from that approach and embark again upon the ill-fated and analytically unacceptable course the Vermont Supreme Court has charted. Instead, the time has come to carry *Gertz* to its logical conclusion. The only way to reach a just result is to apply the same constitutional limitations on damages to every defamation defendant.

CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

GORDON LEE GARRETT, JR.
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383
(404) 581-8000

Counsel for Petitioner

HUGH M. DORSEY, JR.
DAVID J. BAILEY
WILLIAM B. B. SMITH
HANSELL & POST
ATLANTA, GEORGIA

PETER J. MONTE
YOUNG & MONTE
Northfield, Vermont

A. BUFFUM LOVELL
GENERAL COUNSEL
DUN & BRADSTREET, INC.
New York, New York

Of Counsel